Supreme Court, U.S.
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No. 95-857

In the Supreme Court of the United States

OCTOBER TERM, 1995

CAESAR HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for possessing cocaine with the intent to distribute it.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 65 F.3d 181 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1995. A petition for rehearing was denied on October 18, 1995. Pet. App. 6a. The petition for a writ of certiorari was filed on December 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2). The district court sentenced him to a term of 121 months' imprisonment, to be followed by a five-year period of supervised release.[1] The court of appeals affirmed. Pet. App. 1a-3a.

1. a. On August 20, 1991, confidential informant Luis Escobedo and a female informant met with Jose Pereira-Garcia (Pereira) as part of a Drug Enforcement Administration (DEA) narcotics investigation. The female informant was introduced to Pereira as Escobedo's girlfriend; her function was to negotiate with Pereira on Escobedo's behalf. She later met with Pereira to discuss a debt that Escobedo owed to Pereira. Gov't C.A. Br. 3.

As a result of those meetings, DEA agents arranged a controlled delivery of 20 kilograms of cocaine to Pereira on September 5, 1991. Agents packaged the cocaine in four five-kilogram bundles and placed the bundles in a cardboard box. The cocaine overflowed the box; when its top flaps were

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[1] At the close of all the evidence, the district court entered a judgment of acquittal with regard to Count 1 of the indictment, which charged petitioner with conspiring to possess cocaine with the intent to distribute it. Gov't C.A. Br. 2. At an earlier trial, the jury had returned verdicts of guilty on both counts of the indictment, but after the verdict was returned, the district court declared a mistrial and granted petitioner a new trial. The court of appeals affirmed the new trial order (*ibid.*).

folded together, they were raised one or two inches. Gov't C.A. Br. 3.

Agents placed the cocaine in the back of a red Chevrolet Blazer. The back of the Blazer was otherwise empty. The cardboard box with raised flaps was visible from outside the Blazer through the vehicle's windows. In addition, the cocaine had a noticeable odor. Gov't C.A. Br. 4.

Pereira had given instructions to park the Blazer behind a shoe store. To facilitate surveillance, however, the agents decided to park the Blazer in front of the store. Undercover detective Luis Fernandez drove the Blazer to the store. He had been instructed to say that he owned the 20 kilograms of cocaine and was helping Escobedo to pay his debt. Gov't C.A. Br. 4.

Detective Fernandez arrived at the shoe store in the red Blazer at about 5:00 p.m. He and the female informant, who arrived separately, met and entered the store. Fernandez gave the keys to the Blazer to Pereira. Shortly thereafter, Fernandez and the female informant left the store, got into the informant's car, and drove off. Gov't C.A. Br. 4.

Petitioner, who was Pereira's brother-in-law, thereupon walked out of the shoe store, got into the Blazer, and drove away. Officers in approximately eight unmarked cars began to follow petitioner, who drove north on Southwest 137th Avenue for a few blocks to Southwest 22d Street, towards his home at 13420 Southwest First Street. At Southwest 22d Street, however, petitioner turned left and accelerated, driving at more than 60 miles per hour in a residential neighborhood with a 35-mile-per-hour speed limit. Gov't C.A. Br. 4-5.

After petitioner changed direction and accelerated, the officers turned on their blue lights and sirens and pursued petitioner at high speed as he led them on a circuitous route for several blocks. Although he had originally driven north, when the chase ended, he was traveling south, away from his home. During the chase, an agent approached petitioner head-on and stopped on a diagonal in petitioner's path. Petitioner veered onto a lawn to avoid the agent's vehicle and continued past him at high speed. Eventually, other agents used their vehicles to box in the Blazer and forced it to stop, even though petitioner had tried to avoid them by driving onto the sidewalk and through other yards. The agents arrested petitioner and recovered the 20 kilograms of cocaine, which had a wholesale value of $300,000 and a retail value of $2 million. Gov't C.A. Br. 5.

b. At the close of the government's case, petitioner moved under Federal Rule of Criminal Procedure 29(a) for a judgment of acquittal. The district court denied that motion. Gov't C.A. Br. 2. Petitioner thereupon testified that Pereira had telephoned him and asked him to come immediately to the shoe store, without explaining why he was needed, and that when he arrived at the store Pereira asked him to drive the Blazer home. He admitted driving the Blazer away from the store, but denied that he had seen the cocaine-filled box, that he had known that there was cocaine in the Blazer, or that he had smelled an unusual odor in the Blazer. *Id.* at 6.

Petitioner further testified that while driving the Blazer he realized that he did not know whether Pereira wanted him to drive to Pereira's home or his own, so he decided to return to the shoe store to ask Pereira for directions. He conceded driving around a

vehicle approaching him head-on in order to avoid a collision, but denied knowing that he was being pursued by police; he testified that he had not seen blue lights and that he had not heard any sirens. Gov't C.A. Br. 6-7.

Petitioner admitted that, on two or three occasions during the six months preceding September 5, 1991, he had helped Pereira to count large quantities of cash, between $100,000 and $150,000 on each occasion. On one such occasion, petitioner delivered the money he and Pereira had counted to a man named "Armando." Petitioner admitted that he suspected the money he had counted was derived from criminal activity, but explained that he believed that Pereira had stolen that money from drug dealers by taking luggage containing money from Eastern Airlines, where, before 1991, Pereira had worked as a baggage handler. Petitioner stated that he believed that the money delivered to Armando was a commission for Armando's participation in the scheme. Gov't C.A. Br. 7-8.

Petitioner denied helping Pereira to hide money in a secret compartment in a pickup truck, receiving compensation from Pereira for helping him to count money, or expecting compensation for driving the Blazer on September 5, 1991. He conceded that Pereira had loaned him approximately $30,000 before 1991, but said that he had repaid those loans and introduced checks totalling $16,000 that he said represented loan payments. Gov't C.A. Br. 8-9.

Petitioner testified that Pereira had spent large amounts of money on members of his family, including petitioner and his wife. Petitioner testified that he never asked Pereira the source of that money, but believed the money might have come from the Pereira

family's shoe store. Petitioner testified that he did not know whether Pereira or Pereira's father owned the store, which was a father-and-son operation. Gov't C.A. Br. 9.

c. The government called Pereira, who had pleaded guilty before petitioner's trial to Count 1, as a rebuttal witness. Gov't C.A. Br. 2 n.1. Pereira testified that he had been helped by petitioner to count money from Escobedo on four to eight occasions, and that the total the two men counted was between $1.5 million and $2 million. Pereira further testified that on three or four occasions petitioner had helped him to conceal money in a hidden compartment in a van parked in petitioner's garage. The van belonged to Colombian drug dealers, and Pereira transferred the money to them by parking the van in a location where they could retrieve it. Pereira stated that he had paid 80% of the purchase price for petitioner's home and had given petitioner another $20,000 for expenses. Pereira said, however, that he had not told petitioner that the Blazer contained cocaine on September 5, 1991, that petitioner was not involved in narcotics with him, and that petitioner did not know that he was involved with narcotics. *Id.* at 10-11.

d. At the close of all the evidence, petitioner renewed his motion for a judgment of acquittal. The district court granted the motion on Count 1 of the indictment (cocaine conspiracy), but denied it as to Count 2 (possession of cocaine with the intent to distribute it). Gov't C.A. Br. 2.

2. On appeal, petitioner challenged (see Pet. C.A. Br. 13-24) the sufficiency of the evidence supporting his conviction. The court of appeals affirmed. Pet. App. 1a-3a.

After noting (Pet. App. 1a-2a) that petitioner's defense was lack of knowledge that there was cocaine in the Chevrolet Blazer, the court reviewed (*id.* at 2a) the government's evidence. That evidence included Pereira's testimony that petitioner had helped him to count between $1.5 million and $2 million in cash; the fact that petitioner had been arrested after being the driver and sole occupant of a vehicle containing 20 kilograms of cocaine; and the fact that petitioner had led agents on a circuitous high-speed chase through a residential neighborhood before his arrest. The court acknowledged (*ibid.*) that petitioner had testified that he had not seen the agents' lights or heard their sirens, and was not trying to flee the agents. The court noted, however, that the jury was entitled to disbelieve that testimony and to believe that the opposite was true (*ibid.*). It added that "where some corroborative evidence of guilt exists for the charged offense * * * and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense" (*ibid.*, quoting *United States* v. *Brown*, 53 F.3d 312, 314-315 (11th Cir. 1995), petition for cert. pending, No. 95-6419 (filed Oct. 9, 1995)). The court concluded (Pet. App. 2a-3a) that in light of the government's affirmative evidence and petitioner's testimony, which the jury was free to disbelieve, it could not say that a reasonable jury could not have found petitioner guilty.[2]

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[2] The court of appeals summarily rejected petitioner's other claims on appeal. Pet. App. 1a n.*.

ARGUMENT

Petitioner contends (Pet. 6-12) that the court of appeals erred in stating that a defendant's testimony denying guilt may, in certain circumstances, be considered by a reviewing court in determining whether the evidence of guilt was sufficient. While there is some disagreement among the courts of appeals as to the circumstances under which such testimony may be taken into account in determining sufficiency, the court of appeals' decision in this case was correct under any approach to that question. Moreover, the government's evidence, standing alone, was sufficient to establish petitioner's guilt. This case therefore does not present a suitable vehicle for resolving that conflict. Furthermore, a recent amendment to Federal Rule of Criminal Procedure 29(b) has largely obviated the question posed by petitioner, by enabling defendants in many cases to preserve the right to claim on appeal that the evidence presented by the government, standing alone, was insufficient.[3]

1. The evidence is sufficient to support a conviction where, viewing the evidence in the light most favorable to the prosecution, with all reasonable inferences taken in support of the verdict, a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The elements of the offense described by 21 U.S.C. 841(a)(1) are that the defendant (1) knowingly (2) possessed cocaine (3)

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[3] Two petitions pending before the Court raise the same issue that is presented in the instant petition. See *Brown* v. *United States*, petition for cert. pending, No. 95-6419 (filed Oct. 9, 1995); *Mullis* v. *United States*, petition for cert. pending, No. 95-693 (filed Oct. 10, 1995).

with the intent to distribute it. See, *e.g.*, *United States* v. *Rodgers*, 18 F.3d 1425, 1429 (8th Cir. 1994); *United States* v. *Nelson*, 6 F.3d 1049, 1053 (4th Cir. 1993); *United States* v. *Ocampo*, 937 F.2d 485, 488 (9th Cir. 1991). In this case, those elements were established by the evidence presented by the government, standing alone.

The government's evidence in its case-in-chief established that, when petitioner was arrested, he was the driver and sole occupant of a vehicle containing 20 kilograms of cocaine with a wholesale value of $300,000 and a retail value of $2 million. That evidence further established that, immediately before petitioner's arrest, he fled from the police in a high-speed circuitous chase through a residential neighborhood. The jury was entitled to infer from petitioner's evasive and irregular conduct while driving that he was aware that the package inside the vehicle contained contraband, and that petitioner, aware of the incriminating nature of that contraband, was seeking to elude the authorities. See Gov't C.A. Br. 15-16. As the district court found in denying petitioner's motion for judgment of acquittal after the close of the government's case, that evidence supplied a sufficient basis for a jury to find the elements of the offense beyond a reasonable doubt.

By presenting evidence following the denial of his motion for judgment of acquittal, petitioner waived his right to have the sufficiency of the evidence based solely on the evidence presented in the government's case-in-chief. See Fed. R. Crim. P. 29 advisory committee's note (1994 amendment) (defendant who presents evidence after the denial of a motion for judgment of acquittal made after government's case "run[s] the risk that [the evidence offered by the

defense] will support the government's case"); Fed. R. Crim. P. 29(b) (only where district court reserves ruling on motion for judgment of acquittal does defendant who later offers evidence retain right to have sufficiency motion decided based on evidence at time of motion); *United States* v. *Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), aff'd on other grounds, 506 U.S. 534 (1993); *United States* v. *Allison*, 908 F.2d 1531, 1535 (11th Cir. 1990), cert. denied, 500 U.S. 904 (1991); *United States* v. *Kenny*, 645 F.2d 1323, 1346 (11th Cir.), cert. denied, 452 U.S. 920 (1981). The evidence offered by the government in its rebuttal case was therefore properly considered by the court of appeals. That evidence further demonstrated that petitioner knew and had reason to know that the delivery of the goods inside the Blazer related to the narcotics trade. In particular, Pereira, petitioner's brother-in-law, testified that on as many as eight occasions in the six months before September 5, 1991, petitioner had helped Pereira to count money derived from the sale of cocaine, and that on some of those occasions, petitioner assisted Pereira to stash large sums of cash in a concealed compartment in a van belonging to Colombiana. On another occasion, petitioner delivered a sum of that cash to a man named "Armando" at Pereira's request. See Gov't C.A. Br. 16 (reviewing rebuttal evidence). Thus, taking into account only the evidence offered by the government, the evidence was sufficient to support petitioner's conviction.

2. The court of appeals based its holding that the evidence was sufficient on all the evidence in the case: the evidence presented by the government as well as petitioner's testimony, which, the court noted, "the jury was free to disbelieve." Pet. App. 2a (citing *Brown*, 53 F.3d at 314-315). The court did not state

that the evidence offered by the government, standing alone, would not have been sufficient.

Even if the government's evidence, standing alone, had been insufficient, it was appropriate for the court of appeals to consider petitioner's testimony in evaluating his sufficiency claim. It is well established that, in addition to considering affirmative evidence of guilt offered on either the government or defense case, a jury may draw negative inferences from a defendant's testimony and consider those inferences in reaching a verdict. See *United States* v. *Friedman*, 998 F.2d 53, 57 (2d Cir. 1993) (jury entitled to draw negative inferences from defendant's testimony at trial); *Zafiro*, 945 F.2d at 888 (where defendant takes the stand "and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence"); *United States* v. *Bauer*, 19 F.3d 409, 412 n.2 (8th Cir. 1994) (same); *Kenny*, 645 F.2d at 1346 ("When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth."); *Allison*, 908 F.2d at 1535 (jury may reject defendant's explanation "as a complete fabrication" and view "[the] defendant's false explanatory statement as substantive evidence proving guilt"). A plurality of this Court recently concluded that, when a jury disbelieves a testifying defendant, it is "further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright* v. *West*, 505 U.S. 277, 296 (1992) (opinion of Thomas, J.).[4]

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[4] Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's plurality opinion. 505 U.S. at 278. None of the six Justices who concurred in the judgment disagreed with Justice

The question whether a jury may treat a defendant's false testimony as affirmative evidence of guilt is, of course, distinct from the question of when an appellate court may consider that false testimony in evaluating whether the evidence against him was sufficient. On that question, the courts of appeals have reached different conclusions. In *Zafiro*, *supra*, the Seventh Circuit stated in dicta that the false testimony of a defendant in denying the charges against her "becomes evidence of guilt to add to the other evidence" considered in the inquiry into sufficiency. See 945 F.2d at 888. As petitioner notes (Pet. 6-10), the District of Columbia Circuit has taken a different approach. It has held that, although the substance of a defendant's testimony may be considered in determining the sufficiency of the evidence, it is generally improper for an appellate court to assume that the jury may have drawn negative inferences from a testifying defendant's demeanor. *United States* v. *Zeigler*, 994 F.2d 845, 848-850 (D.C. Cir. 1993); see *United States* v. *Thorne*, 997 F.2d 1504, 1511 (D.C. Cir.) (same), cert. denied, 114 S. Ct. 568 (1993); *United States* v. *Jenkins*, 928 F.2d 1175, 1178-1179 (D.C. Cir. 1991); see also *United States* v. *Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984) (reaching same result), cert. denied, 470 U.S. 1058, 471 U.S. 1137 (1985).[5]

Thomas's statement that a defendant's testimony could be considered as affirmative evidence of guilt. See *id.* at 297-316. In his opinion concurring in the judgment, Justice Souter stated that a similar state evidentiary rule "has the virtue of much common sense." *Id.* at 315.

[5] The First and Tenth Circuits have recently noted the disagreement between *Ziegler* and *Zafiro*, but have not found it necessary to decide which view is correct. See *Walker* v.

The present case is not a suitable vehicle for resolving the differing approaches articulated by the Seventh Circuit and the District of Columbia Circuit. First, as we have explained, the evidence presented in the government's case-in-chief and in its rebuttal case was itself sufficient to support petitioner's conviction, and the court of appeals did not suggest otherwise. Resolution of the question whether the demeanor of a testifying defendant may be considered by a reviewing court upon a sufficiency challenge would therefore have no impact upon the resolution of this case.

Second, even if the evidence presented in the government's case-in-chief were not itself sufficient, under the approach taken by the District of Columbia Circuit, an appellate court would be entitled to conclude that the jury drew negative inferences from petitioner's denials of guilt. That circuit has held that an appellate court may treat a defendant's denial of guilt as substantive evidence against him when the "defendant's testimony, on its face, [is] utterly inconsistent, incoherent, contradictory or implausible." *Zeigler*, 994 F.2d at 849. That exception applies in

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Waltham Housing Authority, 44 F.3d 1042, 1049-1050 (1st Cir. 1995); *Stallings* v. *Tansy*, 28 F.3d 1018, 1024 (10th Cir. 1994). The other cases on which petitioner relies (Pet. 6) are inapposite. Those cases merely stand for the proposition that a factfinder's disbelief of a party's testimony does not by itself suffice to meet the opposing party's burden of proof. See, *e.g.*, *Nishikawa* v. *Dulles*, 356 U.S. 129, 137 (1958) (denaturalization proceeding); *United States* v. *Aulicino*, 44 F.3d 1102, 1114-1115 (2d Cir. 1995); *United States* v. *Slone*, 601 F.2d 800, 804 (5th Cir. 1979); *United States* v. *Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956). Neither the Eleventh Circuit in *Brown* nor the Seventh Circuit in *Zafiro* took issue with that proposition.

this case. The court of appeals did not suggest that it was basing its finding of sufficiency at all upon petitioner's demeanor while testifying, and the facts would support the conclusion that it found the jury entitled to disbelieve that testimony itself, based upon its inherent implausibility. Pet. App. 2a. Petitioner's claims that he never saw the flashing blue lights or heard the sirens of the agents' pursuing cars, that he reversed course and began to drive at a high rate of speed in order to return to the .store to ask Pereira for directions, and that he did not see or smell the bulging box that stood alone inside the back of the car were all patently "incoherent, contradictory, or implausible." *Zeigler*, 994 F.2d at 849. Also implausible was petitioner's testimony that he believed the substantial sums of money that Pereira had spent on petitioner's family had come from operation of a shoe store.

3. Finally, in light of a recent amendment to Federal Rule of Criminal Procedure 29(b), it is unlikely that the issue of when a reviewing court may consider a defendant's testimony denying involvement in an offense as evidence of guilt will occur with any frequency. Before that amendment took effect, a defendant who elected to present evidence in a case in which the district court reserved ruling on a motion for a judgment of acquittal at the close of the government's case-in-chief would "run the risk that such evidence will support the government's case." Fed. R. Crim. P. 29 advisory committee's note (1994 amendment). The recent amendment to Rule 29(b) has relieved the defendant of that risk, by providing that, when a district court has reserved ruling on a motion for a judgment of acquittal, "it must decide the motion on the basis of the evidence at the time the ruling was

reserved." Fed. R. Crim. P. 29(b). The advisory committee note to the amended Rule further states that appellate review of such a ruling will be "similarly limited" to the evidence that had been presented at the time the ruling was reserved. Fed. R. Crim. P. 29 advisory committee's note (1994 amendment).

As a result, in future cases in which a defendant moves for a judgment of acquittal at the close of the government's case-in-chief and in which the sufficiency of evidence presented at that point presents a close question, the district court may simply reserve ruling on such a motion at the close of the government's case-in-chief. Because such action will preserve for appellate review the issue whether the government's evidence alone was sufficient, the issue whether the defendant's denials of guilt could be taken into account in a sufficiency inquiry will not arise. It is true, of course, that that issue may still arise where a district court denies a motion for judgment of acquittal made at the close of the government's case, and where the sufficiency of the government's evidence standing alone presents a close question on appeal. Under Rule 29(b) as amended, however, the defendant would have the opportunity in such cases to ask the district judge to reserve ruling on that motion so as to preserve his right on appeal to challenge the sufficiency of the government's evidence alone. Where the government's evidence is not clearly sufficient by itself, it is reasonable to expect that such requests will often be granted. Thus, the issue raised by the petition appears to be of diminishing importance and does not merit review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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